Tentative Rulings for January 24, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG03576	***Rubio v. Fannie Mae*** **(Dept. 402)**
11CECG01541	***Gryphon Solutions v. Silva*** **(Dept. 403)**
11CECG01177	***Chang v. Club One Casino*** **(Dept. 501) - Parties to come in only if Defendants have not fully complied with discovery as discussed during January 9, 2013 hearing.**
12CECG00027	***Matthew Lawrie v. Merrill Lynch*** **(Dept. 502)**
12CECG00714	***Aguilera v. General Motors LLC*** **(Dept. 503)**
12CECG03048	***Jane Doe v. Sanger Unified*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

12CECG03150	***Wells Fargo Bank v. Anezinos*** **is continued to Thursday, February 07, 2013 at 3:30 p.m. in Dept. 501.**
11CECG02659	***Garvey v. City of Fresno*** **is continued to Thursday, February 14, 2013 at 3:30 p.m. in Dept. 501.**
09CECG01076	***Serrano v. Selma Auto Mall*** **is continued to Tuesday, January 29, 2013 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

[10]

Tentative Ruling

Re: ***Espinoza v. Godinez***
Superior Court Case No. 12CECG03204

Hearing Date: Thurs., Jan. 24, 2013 (**Dept. 402**)

Motion: Petition to Compromise Minor's Claim for Juan Jose Villa

Tentative Ruling:

Order Approving Compromise, Order to Deposit Money, and Order Appointing Guardian Ad Litem signed. Hearing off calendar. No appearances necessary.

Counsel is ordered to forward to the depository a Receipt and Acknowledgment on Judicial Council form MC-356, along with a signed copy of the Order to Deposit. Once the depository has signed the Receipt, counsel shall file the completed Receipt with the court, within 30 calendar days of the clerk's service of the minute order.

Explanation:

Pursuant to CRC 3.1312(a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/23/13.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Solorio v. Department of Behavioral Health Services, et al.***, Superior Court Case No. 10CECG03560

Hearing Date: **January 24, 2013 (Dept. 402)**

Motion: County of Fresno's Demurrer to Third Amended Complaint

Tentative Ruling:

To sustain the demurrer to the Third Amended Complaint without leave to amend. Code Civ. Proc. § 430.10(e). Defendant to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant.

Explanation:

The court sustained the demurrer to the Second Amended Complaint on the grounds that it failed to state a cause of action for sexual harassment, and plaintiff had not exhausted her administrative remedies.

On 10/29/12 plaintiff filed the Third Amended Complaint utilizing the Judicial Council form complaint. Paragraph 2 thereof indicates that the complaint has 9 pages, including exhibits. Paragraph 9 alleges that plaintiff has complied with the applicable claims statute. Paragraph 10 indicates that the complaint attaches a cause of action for General Negligence. But there is no such attachment. The TAC consists of only the first three pages of the judicial council form complaint. Accordingly, no cause of action at all is alleged, and the TAC contains nothing that resolves the court's concerns about whether plaintiff her exhausted administrative remedies. For that reason alone the demurrer should be sustained.

Plaintiff also filed on 10/29/12 a 45 page document entitled "IN SUPPOR,O F THIRD AMENDAN MOTION, WITH STAMANET, IN FACT,OF BEEN HARASSMENT, BY,CO-WORERS, SEXUL HARASSMENT,CO-WORKER". It is unclear if plaintiff intended this document to be a motion of some sort, the nature of which the court cannot ascertain, or to serve as the statement of facts of the Third Amended Complaint. Out of an abundance of caution, the court will address the demurrer as if the latter is the case.

Plaintiff's complaint primarily appears to allege sexual harassment. The elements of a claim for "environmental sexual harassment" are: "(1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608-09; see also Gov. Code § 12940(j). Plaintiff's "Statement of Cause and Facts" indicated that plaintiff was employed by defendant and alleges conduct in the workplace by co-worker Fernando Gonzalez that rises to the level of sexual harassment. See pp. 2, 25-27, 37-39.

The "Statement of Cause and Facts" also contains many allegations of physical and verbal harassment (not of a sexual nature) by various co-workers. A plaintiff alleging of a hostile workplace environment must show that the harassment was because of plaintiff's membership or association with a protected class. Gov. Code § 12940(j). None of the allegations indicate that any of this non-sexual conduct was because of her membership or association with a protected class, such as gender, age, physical or mental disability, race, religion, sex, color or national origin. Gov. Code § 12940(a). Though this conduct is not actionable, the allegations of sexual harassment are. If the essential facts of some valid cause of action are alleged, the complaint is good against a general demurrer. *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39; *Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 359; see *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998 [general demurrer may be upheld "only if the complaint fails to state a cause of action under any possible legal theory"].

The next issue is exhaustion of administrative remedies.

Gov. Code § 12960 provides that "(b) Any person claiming to be aggrieved by an alleged unlawful [employment] practice may file with the [DFEH] a verified complaint, in writing, that shall … set forth the particulars thereof and contain other information as may be required by the [DFEH]. … [¶] … [¶] (d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice … occurred … ."

> Before maintaining a legal action, a plaintiff must exhaust the administrative remedy of filing a timely complaint with the DFEH and obtaining permission to pursue legal remedies. … The one-year period specified in the statute begins to run when the administrative remedy accrues, which is the occurrence of the unlawful practice.

Holland v. Union Pacific Railroad Co. (2007) 154 Cal.App.4th 940, 945, citing *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492-493.

A person who receives a right-to-sue letter from DFEH has one year to initiate a civil action against the employer or person named in the complaint. Gov. Code § 12965.

Though at paragraph 9 of the First Amended Complaint plaintiff checks boxes alleging that she is required to comply with a claims statute and has complied with the applicable claims statute, the facts alleged in the "Statement of Cause and Facts" show that plaintiff either failed to exhaust her administrative remedies, or failed to commence a civil action after having done so.

Plaintiff alleges that she reported harassment of an unspecified nature to the DFEH on 5/8/2001, and that she received her right-to-sue from the DFEH 4/16/01. See pp. 10, 44. As plaintiff did not file the complaint in this matter until 10/7/10, any such claims are clearly time barred. Gov. Code § 12965.

Plaintiff also appears to allege that acts of sexual harassment by Gonzalez occurred from 2003 to 2006. See p. 25. On p. 3 of the "Statement of Cause and Facts" plaintiff alleges that in 2004 she reported sexual harassment to her supervisor Abel Esquivel, and the office assistant supervisor, Carmen McClenland. They told plaintiff that they would take it to management and send the report to the DFEH. A couple months later, plaintiff met with defendant personnel, asked for a copy of the report that was filed, but was told that no report was filed with DFEH. P. 3.

As defendant correctly argues, even if some sort of estoppel theory were applicable here, due to the representation that defendant personnel would file the report with the DFEH but didn't, plaintiff knew, either in 2004 or 2005, that no such report had been filed. The one-year statute of limitations clearly has expired to any claims related to this 2004 complaint.

On page 44 plaintiff asserts that she filed a complaint with the DFEH on 7/18/12. The court takes judicial notice of the SAC (Evid. Code § 452(d)), which alleges that she suffered the adverse employment action on 6/20/09. This DFEH complaint was clearly filed more than one year after the date of the alleged unlawful practice occurred. The court can identify no actionable conduct alleged in the complaint that occurred within a year of filing the complaint, much less within the year preceding the filing the 7/18/12 DFEH complaint, which was filed after the complaint in this action was filed.

Since the TAC and "Statement of Cause and Facts" disclose that plaintiff did not exhaust her administrative remedies or commence this action within one year of doing so, the demurrer is sustained without leave to amend.

The court notes that the document filed by plaintiff on 1/15/13, to the extent it is intended to serve as an opposition to the demurrer, will not be considered as such, as it was not timely filed (Code Civ. Proc. § 1005) and exceeds the page limit for an opposition (Cal. Rules of Court, Rule 3.1113(d)).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/23/13.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Khalid v. Nava***
Superior Court Case No.: 12CECG00705

Hearing Date: January 24, 2013 (**Dept. 402**)

Motion: Default prove-up

Tentative Ruling:

The court has reviewed the prove-up documents, and is prepared to and will grant a court judgment in the principal amount of $115,978.78, plus $9,488.24 in interest, $535.15 in costs, and $5,909.78 in attorney's fees. However, Plaintiff must bring to the hearing a file-conformed application for court judgment (see below) and a corrected proposed judgment, preferably on Judicial Council of California Form JUD-100.

Explanation:

When applying for a court judgment, a plaintiff must use mandatory Judicial Council of California Form CIV-100, the same form used to request entry of default. Plaintiff cannot draft his own "application for entry of default judgment" on pleading paper. Requesting or applying for a court judgment is a separate step from entry of default (even though the same form is used). (Code Civ. Proc. § 585, subd. (b)—"The plaintiff thereafter [after entry of default by the clerk] may apply to the court for the relief demanded in the complaint.")

The judgment which Plaintiff has submitted seeks recovery of costs according to proof. When seeking a clerk's judgment or a court judgment on default, costs are to be listed on the second page of Judicial Council of California Form CIV-100, ¶7, which Plaintiff completed his its "request for clerk's judgment" that he filed on October 3, 2012. Plaintiff should fill out that same section when requesting costs for a court judgment. Curiously, on the proposed default judgment which has been submitted, it incorrectly states: "Plaintiff is to recover post judgment costs according to proof." The court prefers judgments be prepared on optional use Judicial Council of California Form JUD-100.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 1/23/13.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(18)

Tentative Ruling

Re: ***Eatherly v. Farkas***
Case no. 11CECG04261

Hearing Date: **January 17, 2013 (Dept. 403)**

Motions: By plaintiff: to compel the depositions of April and Jay Farkas, and for monetary sanctions

Tentative Ruling:

To deny the motions to compel as moot, and to deny monetary sanctions.

Explanation:

On January 4, 2013 plaintiff took the depositions of both defendants. The result is that the motions to compel are now moot. Accordingly, the only issue for the court to adjudicate is monetary sanctions. The declarations of Dhillon and defendant Jay Farkas demonstrate that, pursuant to California Code of Civil Procedure (CCP) section 2025.450(c)(1), the imposition of sanctions would be unjust. Accordingly, sanctions are denied.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5 subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/15/2013.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Mojica v. Moore***
Case No. 11CECG03491

Hearing Date: January 24th, 2013 (Dept. 403)

Motion: Defendant Moore's Motion for Summary Judgment

Tentative Ruling:

To grant the motion for summary judgment in favor of defendant Jerry Moore, M.D. (CCP § 437c.)

Explanation:

In cases of medical malpractice, the defendant can meet his or her burden on summary judgment by presenting the declaration of an expert stating that defendant did not breach the standard of care in the applicable profession. "'The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.' [Citations.]" (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410.) Once the defendant doctor presents qualified expert testimony showing that he or she did not breach the standard of care, the burden shifts to plaintiff to present his or her own expert declaration showing that there was a breach of the standard of care. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 509; *Munro v. Regents of Univ. of Cal*. (1989) 215 Cal.App.3d 977, 983-985.)

Defendant has presented the declaration of his medical expert, Dr. Gary Bellack, who opines that defendant did not breach the standard of care when he treated plaintiff for a mass on his neck. (Bellack decl., ¶¶ 7-9.) Dr. Bellack appears to be a qualified medical expert in the appropriate field of medicine. (*Id*. at ¶¶ 1-4.) His opinion is supported by references to the facts, as well as the medical records and discovery responses provided by plaintiff. (Exhibit B to Bellack decl.) Dr. Bellack states that the procedure performed by defendant was medically indicated, that defendant obtained informed consent from plaintiff, and that defendant took appropriate steps to locate and identify the nerves in the area during the procedure, and checked to make sure the nerves were intact during the procedure. (*Id*. at ¶ 8(a)-(d).) Damage to the nerves is a known risk of the type of surgical procedure performed by defendant. (*Id*. at ¶ 8(c).) Therefore, the harm to plaintiff did not occur because of any breach of the standard of care by defendant. (*Id*. at ¶ 8(d).) Instead, this type of injury is a known risk of the procedure. (*Ibid*.) As a result, defendant has met his burden of showing that he did not breach the standard of care.

Plaintiff has not submitted any expert declarations in opposition to raise a triable issue of material fact with regard to the issue of whether defendant breached the standard of care. Indeed, plaintiff has filed a notice of non-opposition, so he apparently concedes that he cannot demonstrate such a breach of duty. As a result, the court intends to grant the motion for summary judgment in favor of defendant Moore.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/16/2013.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Fiorini v. Phusion Projects, LLC et al.***
Superior Court Case No. 11CECG03802

Hearing Date: January 24, 2013 (Dept. 403)

Motion: City Brewing Co.'s Motion for Judgment on the Pleadings
Applications for Admission Pro Hac Vice (2)

Tentative Ruling:

To grant both applications for admission pro hac vice for D. Patterson Gloor and Phillip R. Nava. The orders for admission pro hac vice have been signed. To grant the motion for judgment on the pleadings of defendant City Brewing Company, LLC.

Explanation:

A motion for judgment on the pleadings has the same function as a general demurrer in that it is used to challenge pleadings that do not state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 438, subd. (c).) Since the motion has the same function as a general demurrer, the rules governing demurrers apply as well to these motions unless the statute provides otherwise. (Id. at § 7:275.) As with a demurrer or motion to strike, the grounds must appear on the face of the pleading or from facts subject to judicial notice. (Rylaarsdam & Edmon, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2011) § 7:292.) The court reviews the complaint liberally, giving it a "reasonable interpretation, reading it as a whole and its parts in their context." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1323; Code Civ. Proc., § 452.)

Here, City Brewing's motion for judgment on the pleadings mirrors this court's October 30, 2012 Order sustaining the demurrers of defendants Phusion Projects, LLC and Donaghy Sales, LLC. Plaintiff's opposition presents an attack on the order. Accordingly, the court addresses plaintiff's arguments in turn.

Restatement of Torts & Naegele v. J.R. Reynolds Tobacco Co.

Plaintiff maintains this court's prior Order errs in failing to consider section 402A of the Restatement (Second) of Torts. In *Pike v. Frank G. Hough Co.*, the California Supreme Court held that California followed the strict liability rule articulated in § 402A of the Restatement (Second) of Torts, which provides that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and

> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(*Pike v. Frank G. Hough Co.*, 2 Cal.3d 465, 475 (quoting Restatement (Second) of Torts § 402A(1)(b).) Plaintiff next argues, based Comment i to section 402A of the Restatement, that Four Loko is "bad whiskey" – a dangerous and adulterated product:

> Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Plaintiff fails to note that the California Supreme Court rejected the requirement in the section 402A that a product be "unreasonably dangerous" for general products liability in *Cronin v. J.B.E. Olson Corp*. (1972) 8 Cal.3d 121, 133-135 (*Cronin*). Instead, Civil Code section 1714.45(a) establishes an affirmative defense from products liability for product manufacturers or sellers. A manufacturer or seller is not liable for personal injuries if the product is "inherently unsafe," is "known to be unsafe by the ordinary consumer," and is "a common consumer product intended for personal consumption." (Civ. Code § 1714.45, subd. (a).) In defining "common consumer product intended for personal consumption," the statute references Restatement (Second) of Torts, § 402A (comment i). (*Id*. at § 1714.45, subd. (a)(2).)

The statute's reference to comment i reflects the fact that California common law differs from section 402A. Outside the purview of § 1714.45, California common law departs from Restatement's section 402A comment i. In fact, in *Cronin v. J.B.E. Olson Corp*., *supra*, 8 Cal.3d at pp. 131–133 the California Supreme Court explicitly disavowed the exact formulations of section 402A, including the affirmative defense contained in Restatement section 402A comment i. To the extent that section 402A and comment i are part of California law, it is solely by operation of Cal. Civ. Code § 1714.45. (See also Civ. Code § 1714.45(d) [reaffirming *Cronin* and "existing California law"].)

Section 1714.45 provides, in relevant part:

> (a) In a product liability action, a manufacturer or seller shall not be liable if both of the following apply:
>
> (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community.
>
> (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.
>
> (b) [¶]
>
> (c) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.
>
> (d) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp*. (1972), 8 Cal.3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.
>
> (e) [¶]
>
> (f) [¶]
>
> (g) [¶]

Plaintiff relentlessly argues that Four Loko is "bad whiskey" within the meaning of comment i because it is "adulterated" with vast amounts of caffeine.

First as explained above, California has not adopted comment i outside of section 1714.45. Second, the sole basis in plaintiff's complaint for alleging that Four Loko is "adulterated" is the FDA's November 17, 2010 "warning letter" to defendant Phusion in which the FDA concludes "caffeine is an unsafe food additive, and therefore [Four Loko] is adulterated" under the Federal Food, Drug and Cosmetic Act (FDCA). (See Complaint ¶¶ 29-31.) This letter was written after the October 5, 2010 death of plaintiff's decedent. More importantly, there is no private right of action under the FDCA. (*Pacific Trading Co. v. Wilson & Co., Inc*. (1976 7th Cir.) 547 F.2d 367, 370 ["violations of the FDCA do not create private rights of action"]; *Milan Laboratories, Inc. v. Mat Kari* (1993 4th Cir.) 7 F.3d 1130, 1139, cert. denied (1994) 510 U.S. 1197; *Pinocchio v. Sergio's, Inc*. (1994 N.D. Cal.) 864 Scup. 948, 956.) Plaintiff is attempting to make an end-run around this authority by bootstrapping the post-death violation of the FDCA into a cause of action for products liability. This cannot not be allowed.

Plaintiff also relies on the California Supreme Court's decision in *Naegele v. R.J. Reynolds Tobacco Co*. (2002) 28 Cal.4th 856 (Naegele), in which a majority of the high court held that the immunity granted in former section 1714.45 (Stats.1987, ch. 1498, § 3, p. 5778) [which included tobacco products at the time] did not bar plaintiff's claim that tobacco manufacturers adulterated cigarettes with additives that exposed plainitff to dangers not inherent in cigarettes themselves. The majority further held that section 1714.45 did bar the plaintiff's fraud claim alleging that tobacco companies controlled nicotine content of cigarettes and lied about the addictive nature of smoking.

The majority relied on *Richards v. Owens–Illinois, Inc*. (1997) 14 Cal.4th 985 (*Richards*), a unanimous decision. In *Richards*, the California Supreme Court described section 1714.45 as based on the principle that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user." (*Id*. at p. 999.) The majority seized on the reference to "pure and unadulterated" to conclude, "[a]ccordingly, the statutory immunity does not shield a tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itself—that is, if some adulteration of the product made it unreasonably dangerous." (*Naegele*, *supra*, 28 Cal.4th at p. 864.)

Plaintiff pleads that caffeine is not a substance naturally occurring in alcohol and is an adulterant under section 1714.45. This is not fatal to the instantmotion or the October 30, 2012 order, neither of which depend on section 1714.45.

Business & Professions Code § 25602

This court's prior Order was based on a failure of causation due to Business & Professions Code section 25602, a separate immunity statute. Plaintiff's argument that "to apply section 25602 here would create a super-immunity for seller of "bad whiskey," and brush aside *Naegele* and comment i to section 402A" is poorly taken. The law may provide for many potential immunities. In the end only one may be truly applicable. Section 25602 is the more specific statute, dealing, as it does, only with liquor. Section 25602 was enacted in 1953. (Stats.1953, c. 152, p. 1020, § 1.) Section 1714.45 was enacted in 1987. (Stats.1987, c. 1498, § 3.) Thus, the legislature knew of section 25602 when it enacted section 1714.45. Section 25602 is the broader statute; it covers all "civil liability" based on the furnishing of alcohol. (Bus. & Prof. § 25602, subd. (b).) Section 1714.45 applies only to products liability actions. (Civ. Code § 1714.45, subd. (a).) The legislature did not incorporate the "bad whiskey" language into section 1714.45. Section 25602 requires only that the beverage be "fit for beverage purposes," not "pure and unadulterated."

Section 25602 Applies to Injured Intoxicated Persons

Focusing on the language that the immunity applies to "any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage," [Bus. & Prof. § 25602, subd. (b)] plaintiff argues that the plain language of the statute means that only those injured by the intoxicated are barred from bring suit, while those intoxicated persons who injure or kill themselves are not barred. The California Supreme Court addressed this issue in *Cory v. Shierloh* (1981) 29 Cal.3d 430, finding, the statutory provisions were "not substantive grants of immunity but are merely descriptions of the 'prior judicial interpretation' on the subject of the liability of the provider of alcoholic beverages," thus "section 25602, subdivision (b), reasonably construed, bars a suit by the intoxicated consumer as well as by third persons injured by him." (*Id*. at p. 437.)

In Appropriate Cases, Causation May be Resolved as a Matter of Law

Plaintiff argues the question of whether the intoxication led to the injury, as opposed to some other cause, must be resolved prior to determining whether section 25602 applies. Because plaintiff alleges that the cause of his decedent's death was the "dangerous and unapproved addition of stimulants and caffeine to alcohol," he contends the applicability of section 25602 cannot be resolved on demurrer. The appellate courts affirmed the sustaining of demurrers without leave to amend in *Cory v. Shierloh* (1981) 29 Cal.3d 430 and *Leong v. San Francisco Parking, Inc*. (1991) 235 Cal.App.3d 827, 829.

Additionally, because plaintiff cannot use the violation of the FDCA to create a cause of action, the fact that the combination of stimulants and caffeine and alcohol was unapproved is irrelevant. Moreover, section 25602 dictates causation where the other factors in the statute are present. Specifically section 25602 provides, that "the consumption of alcoholic beverages rather than the serving of alcoholic beverages" will be deemed "the proximate cause of injuries inflicted … by an intoxicated person." The Complaint clearly alleges that the Four Loko consumed by decedent contained the alcohol content of five to six 12 ounce cans of beer and as much caffeine as 2 cups of coffee. (Complaint ¶ 12.) plaintiff's decedent drank two Four Lokos and a "quantity of beer. (Complaint ¶ 38.) The complaint asserts the danger of Four Loko is that the drinker would not realize how drunk he or she was. (See Complaint ¶ 16 "masking intoxication"; ¶ 20 "reduces subjective perceptions of alcohol-induced impairment as compared to alcohol alone" "users become desensitized to the symptoms of intoxication, which increases the potential for alcohol-related harm.") Finally the complaint alleges that the product caused a high level of "intoxication disorientation and agitation" leading to his death. (Complaint ¶¶ 51, 58.) The facts are inescapable. Four Loko is an alcoholic drink. The consumer of Four Loko cannot understand how drunk he or she is and does dangerous aberrant things causing injuries, and sadly, in this case death. Unfortunately, these are exactly the same risks of alcohol overconsumption consumption. Based on the allegations of the complaint, plaintiff cannot separate the dangerousness of Four Loko from the alcohol content of Four Loko and the alcohol content of Four Loko is not actionable, so long as the drink is "fit for beverage purposes."

"Fit for Beverage Purposes"

"Alcohol beverage" within the meaning of section 25602 is defined" as:

> [A]lcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one half of 1 percent or more of alcohol by volume and *which is fit for beverage purposes either alone or when diluted, mixed or combined with other substances*.

(Bus. & Prof. Code § 23004 (emphasis added).)

Few cases address what "fit for beverage purposes" means. The October 30, 2012 Order discusses them. (See *Commercial Solvents Corp. v. Riley* (1936) 7 Cal.2d

731; *American Distilling Co. v. State Board of Equalization* (1956) 144 Cal.App.2d 457; *National Distillers Products Corp. v. Board of Equalization* (1947) 83 Cal.App.2d 35.)

Plaintiff criticizes the cases as too old and not considering section 23004 or section 25602. Still, the Legislature is presumed to know about existing case law when it enacts or amends a statute. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Moreover, *American Distilling Co. v. State Board of Equalization* dates after the enactment of section 25602.

However, section 23004 specifically considers the combination of alcohol with other substances. In this respect it is more generous than either section 1714.45 or the FDCA. Few would argue that an Irish Coffee is not fit for beverage purposes, because both the spirits used in it and coffee are fit for beverage purposes. Nevertheless, under plaintiff's reasoning it would be an adulterated beverage and excluded from the Dram Shop Act.

Section 25602 Applies to Distributors, Brewers, Manufacturers and Creators

Section 25602 applies to "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away" any alcoholic beverage. As such it logically applies to any entity in the chain of distribution who sells the alcohol or otherwise "furnishes," i.e. transfers it to the next link. The fact that there is no case law on this readily apparent conclusion is not dispositive.

Section 25602 Applies Expansively

Plaintiff continues to argue that the language in subdivision (a) limits section 25602's immunity to be granted only to persons who gave alcohol to a "common drunkard" or an "obviously intoxicated person." However, the California Supreme Court has rejected this interpretation in favor of giving section 25602 an expansive reading: "Were the reference interpreted as limiting, then [section 25602] ... would bar suit only against a person supplying alcoholic beverages to an obviously intoxicated consumer, yet permit tort recovery against one who supplies to a sober individual who later becomes intoxicated. Obviously, the supplier in the former situation is better able to foresee the risk of harm to others and thus engages in the more culpable conduct. [Citation.] We do not believe the Legislature intended such a whimsical anomaly." (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 725.)

The Cuevas Case

Federal District Court opinions are not binding precedent on this court, though they may be considered if persuasive. (See *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301.) In *Cuevas v. United Brands Co., Inc*. (Mar. 8, 2012 S.D. Cal.) 2012 WL 760403, a federal district court found that section 1714.45 did not bar a plaintiff's *breach of warranty claim*[1] for failure to warn of the combination of caffeine and alcohol. The court finds the discussion in *Cuevas* to be short and unremarkable,

[1] No personal injury claims were made in *Cuevas*.

and therefore not persuasive. Moreover, the basis for this court's Order was not section 1714.45, but rather section 25602. Therefore *Cuevas* is irrelevant.

Other Uncitable Authority

The court similarly rejects plaintiff's citation to a Northern District of New York decision involving Four Loko, *Yourth v. Phusion Projects, LLC* No 11-01261 (N.D. N.Y. Sept. 27, 2012.) as that case involved preemption arguments as to warning labels, an argument not raised by City Brewing herein.

Plaintiff cites, but does not provide, a portion of a trial court order in *Aquirre v. Phusion Projects, LLC*, Contra Costa County Superior Court Case No. MSC 12-00438, rejecting what is represented as a similar challenge to an allegedly similar complaint. It is settled that a California Superior Court order is not citable and has no precedential value. (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1148.)

The motion is granted.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 1/23/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(5)

Tentative Ruling

Re: ***Villarreal v. Parvez et al.***
Superior Court Case No. 12CECG01769

Hearing Date: January 24, 2013 **(Dept. 501)**

Motions: (1) By Plaintiff to compel further responses to RFAs Set One and Form Interrogatory No. 17.1 as to Defendant Parvez;
(2) By Plaintiff to compel further response to RFAs Set One and Form Interrogatory No. 17.1 as to Defendant Sturman;
(3) By Plaintiff to compel further response to Form Interrogatory No. 17.1 as to Defendant Saint Agnes Medical Center

Tentative Ruling:

To grant the motion as to all Defendants.

Dr. Parvez is ordered to provide further responses to Requests for Admission Set One and Form Interrogatory 17.1 in conformity with CCP §§ 2033.010, 2033.220 and 2030.220 within 10 days of notice of the ruling.

Dr. Sturm is ordered to provide further responses to Requests for Admission Set One and Form Interrogatory 17.1 in conformity with CCP §§ 2033.010, 2033.220 and 2030.220 within 10 days of notice of the ruling.

Defendant Saint Agnes Medical Center is order to provide further response to Form Interrogatory 17.1 in conformity with CCP §§ 2033.220 and 2030.220 within 10 days of notice of the ruling.

The date the minute order is mailed by the Clerk constitutes notice of the ruling (plus 5 days for service via regular mail).

Explanation:

CCP § 2033.010. Persons subject to **admission requests**; restrictions; scope of requests states:

> Any party may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by a written request that any other party to the action admit the genuineness of specified documents, or the

> truth of specified matters of fact, **opinion relating to fact, or application of law to fact**. A request for admission may relate to a matter that is in controversy between the parties

Thus, an RFA may require "an application of law to fact." [CCP § 2033.010]

As a result, it has been determined that a party may be required to admit or deny who is the "owner" of property; or whether the driver of a car had the owner's "permission or consent"; or whether specified acts were "negligent"; or whether a third person was an "authorized agent" or was acting in the "course and scope of employment," etc. *See Burke v. Sup.Ct. (Fidelity & Dep. Co. of Maryland)* (1969) 71 C2d 276, 280—whether attachment levy was "regular on its face"; and *Garcia v. Hyster Co.* (1994) 28 CA4th 724, 735—whether employer was "negligent" and whether such negligence was "legal cause" of P's injuries. See also *Joyce v. Ford Motor Co.* (2011) 198 Cal. App. 4th 1478--when a party is served with a request for admission concerning a legal question properly raised in the pleadings, he or she should make the admission if that party is able to do so and does not in good faith intend to contest the issue at trial, thereby setting at rest a triable issue; otherwise, the party should set forth in detail the reasons why he or she cannot truthfully admit or deny the request; the party cannot object simply by asserting that the request calls for a conclusion of law.

CCP § 2033.220. Scope of response; statement of reasonable inquiry into matters where respondent lacks information or knowledge states:

(a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits.

(b) Each answer shall:

(1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party.

(2) Deny so much of the matter involved in the request as is untrue.

(3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge.

(c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party **shall state** in the answer that **a reasonable inquiry** concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter

Therefore, instead of admitting or denying the RFA, a party may respond by claiming *inability* (lack of sufficient information) to admit or deny the matter stated in the request. [CCP § 2033.220(c)]

But a party responding in this manner *must also state that a reasonable inquiry was made* to obtain sufficient information: i.e., "a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or *readily obtainable* is insufficient to enable that party to admit the matter." [CCP § 2033.220(c) (emphasis added)] The Discovery Act thus requires the responding party to undertake a "good faith" obligation to investigate sources *reasonably available* to him or her in formulating answers to RFAs [CCP § 2033.220(c); see *Chodos v. Sup.Ct. (Lowe)* (1963) 215 CA2d 318, 322] Importantly, a result, information known to a party's *attorney* or *expert witnesses* is deemed "obtainable" by the party. Therefore, responses to RFAs must be made in light of such information. [*Chodos v. Sup.Ct. (Lowe)*, supra—improper to deny RFA claiming lack of personal knowledge, where party's expert witness had the information.] See also *Wimberly v. Derby Cycle Corp*. (1997) 56 Cal.App.4th 618--since requests for admissions are **not limited** to matters within the personal knowledge of the responding party, that party has a duty to make a reasonable investigation of the facts before answering items which do not fall within his or her personal knowledge.

CCP § 2030.220. Answers in response; contents and form; obligations of responding party states:

(a) Each answer in a response to **interrogatories** shall be as complete and straightforward as the information reasonably available to the responding party permits.

(b) If an **interrogatory** cannot be answered completely, it shall be answered to the extent possible.

(c) If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but **shall make a reasonable and good faith effort to obtain the information by inquiry** to other natural persons or organizations, except where the information is equally available to the propounding party

Of note, it has been held that an expert who has been retained by a party and designated as a trial witness may be treated as the agent of that party, so that, in answering interrogatories, the party may be required to furnish *facts known to the expert*. [*Sigerseth v. Sup.Ct. (Canoga Park Lutheran Church)* (1972) 23 CA3d 427, 433]

In light of the foregoing, the objections of all Defendants will be overruled. As for the responses claiming an inability to admit or deny, the responding party must make a reasonable attempt to obtain information to enable the party to admit or deny the RFA even if the information must be obtained from expert witnesses. See *Chodos v. Sup. Ct. (Lowe)*, supra. See also *Wimberly v. Derby Cycle Co*., supra. Therefore, the motion will be granted in full as to all Defendants. The supplemental responses must be in proper form; if an ability to admit or deny is claimed, there must be a statement regarding a reasonable attempt to obtain information. See CCP § 2033.220(c) and CCP § 2030.220(c).

Pursuant to California Rules of Court, Rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 1/22/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 502

[10]

Tentative Ruling

Re: **Coastline RE Holdings Corp. v. San Ramon Court LLC**
Superior Court Case No. 12CECG01527

Hearing Date: Thurs., Jan. 24, 2013 (**Dept. 502**)

Motion: Receiver's UNOPPOSED Motion for an Order

(1) Approving Receiver's Final Report and Final Accounting
(2) Approving Receiver's Fees and Expenses
(3) Terminating Receivership, Discharging Receiver, and Exonerating Bond.

Tentative Ruling:

To GRANT the motion. (**CRC 3.1184 (a)**.)

Proposed Order signed. Hearing off calendar.

Explanation:

The Receiver has made a prima facie showing that he is entitled to an order discharging the Receiver and granting the relief set forth above. Defendants were served with written notice of this motion, but have filed no objection.

Pursuant to CRC 3.1312(a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/22/13.
(Judge's initials) (Date)

(6) **Tentative Ruling**

Re: ***Martinez v. Dorough***
Superior Court Case No.: 10CECG02818

Hearing Date: January 24, 2013 (**Dept. 502**)

Motion: By Defendant Dan Dorough for summary judgment

Tentative Ruling:

To grant. The prevailing party is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order. The Court has not considered Defendant's reply separate statement, or the additional evidence submitted with the reply. The Court declines to rule on the evidentiary objection because no proposed order was submitted with the reply.

Explanation:

Procedural matters

Evidence submitted with the reply was not considered. There is no statutory provision permitting supplemental separate statements or additional evidence to be filed with the reply. (Code Civ. Proc. §437c, subd. (b)(4); *San Diego Watercrafts v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316.) The court will consider only those facts contained in the parties' separate statements. (*Mills v. Forestex* (2003) 108 Cal.App.4th 625, 640-641.)

A party submitting written objections to evidence must submit with the objections a proposed order. (Cal. Rules of Court, rule 3.1354(c).)

First and second causes of action for medical malpractice and medical battery

The first cause of action for medical malpractice alleges that Plaintiff Maria Martinez ("Mrs. Martinez") presented to Defendant Dan Dorough, M.D. ("Defendant") for a dilatation and curettage procedure ("D&C") after she suffered a miscarriage at about nine weeks along in her pregnancy. There are three acts of medical malpractice alleged: (1) failing to use proper care in performing the D&C which resulted in the perforation of her uterus; (2) Defendant removed, without Plaintiff's consent, one of Plaintiff's fallopian tubes; and (3) Defendant performed, without consent, a "tummy tuck" on Plaintiff after perforating her uterus and removing one of her fallopian tubes. (Complaint, ¶¶7-11.)

The second cause of action is for medical battery, and alleges that Defendant removed Plaintiff's fallopian tube and performed a "tummy tuck," both without Plaintiff's permission. The removal of a fallopian tube is a substantially different procedure than the D&C procedure that Plaintiff consented to. Further, the "tummy tuck" was not consented to at all. (Complaint, ¶¶12-18.)

Defendant has met his burden to show there is no triable issue of fact for negligence and battery on the first and third basis for liability, and indeed, Plaintiff has conceded that the first is no longer at issue, saying that "…to be clear, Plaintiffs' Complaint for Damages is not related to the D&C procedure and its complications." (Opposing points and authorities, p. 2:9-10.) Plaintiff also no longer seems to allege that a "tummy tuck" occurred, as there is no evidence offered in opposition to Defendant's motion on that ground. (Decl. of Richard Printz, M.D., filed on January 11, 2013.)

What remains at issue in the motion whether or not Defendant exceeded the scope of consent concerning the removal of the fallopian tube. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239.) To the extent that that Defendant committed negligence [as well as battery] by exceeding that scope so that expert testimony is required (see *Cobb v. Grant, supra,* 8 Cal.3d 229, 241-245), the opinion of Plaintiffs' expert that the consent was exceeded lacks evidentiary value, as will be discussed below.

Beginning with fact #9 in the separate statement, Defendant's evidence says that when he examined the pelvic area after repairing the perforation, he noted the left fallopian tube was "very tortuous," "twisted upon itself," and "grossly abnormal." Defendant consulted with the two board certified obstetricians/gynecologists [who were with him during the operation] regarding the removal of the fallopian tube. Defendant believed the best treatment plan was to remove the fallopian tube as it was not salvageable and so it wouldn't cause health problems in the future. (Decl. of Carl Nash, Defendant's expert, ¶¶18-22.)

The fallopian tube was handed off to a scrub tech and Defendant asked it be sent to pathology; however, it could not be located. (Fact #10.)

Defendant proceeded to remove Plaintiff's old C-section scar. To do this, Defendant cut all the way around the old scar, taking a small amount of tissue until he obtained fresh edges of normal skin without scar. Plaintiff was closed in the normal fashion. (Decl. of Carl Nash, ¶¶18-22.) (Fact #11.)

Dr. Nash reviewed the relevant records, depositions, and documents relating to Plaintiff's care and treatment, reviewed and evaluated the care and treatment provided to Plaintiff, and opined that Defendant met the standard of care in advising her of her treatment options and in providing her with informed consent. (Facts #12-14, 15; decl. of Carl Nash, ¶¶6-8, 14, 22, 28.) Dr. Nash opined that Defendant obtained Plaintiff's consent to the D&C, and that Defendant's performance of the D&C met the standard of care and the perforation of the uterus was not the result of the negligence on Defendant's part. (Decl. of Carl Nash, ¶¶13, 14, 22, 28, 15, 28; facts #16-17 – which are undisputed.)

Dr. Nash opined that it was appropriate and within the standard of care for Defendant to remove the left fallopian tube best it was in Plaintiff's best interest, advisable for her well-being, and within the standard of care. (Facts #20-21, decl. of Carl Nash, ¶¶20-22, 28.)

Dr. Nash also opined that the removal of the left fallopian tube was not outside of the consent that Plaintiff gave. (Fact #22, decl. of Carl Nash, ¶¶13, 14, 20-22, 28; decl. of Kimberlee Gobel, exhibit A.) The consent form provides [bolding added]:

I HEREBY AUTHORIZED AND DIRECT DR. DAN M. DOROUGH AND THE PHYSICIANS WITH WHOM HE WORKS TO PERFORM THE FOLLOWING OPERATION(S)/SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURE(S) UPON ME:

DILATATION AND CURETTAGE.

I ALSO HEREBY AUTHORIZE AND DIRECT DR. DAN M. DOROUGH AND THE PHYSICIANS WITH WHOM HE WORKS TO PERFORM ANY OTHER OPERATION(S)/SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURE(S) THAT HIS/THEIR JUDGMENT MAY DICTATE TO BE ADVISABLE FOR MY/THE PATIENT'S WELL-BEING. DR. DAN M. DOROUGH HAS EXPLAINED TO ME THAT THIS/THESE OPERATION(S)/SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURE(S) MAY INVOLVE CALCULATED RISKS, COMPLICATIONS, INJURY, AND EVEN DEATH FROM BOTH KNOWN AND UNKNOWN CAUSES. NO WARRANTY OR GUARANTEE HAS BEEN MADE AS TO THE RESULT OR CURE, POSSIBLE RISKS OR COMPLICATIONS, IN ADDITION TO THOSE LISTED ON THE REVERSE SIDE HEREOF, INCLUDE [sic]:

BLEEDING, INFECTION, DAMAGE TO UTERUS.

THE ALTERNATIVE METHODS OF TREATMENT, IF APPLICABLE, WERE PRESENTED TO ME. I UNDERSTAND AND CONSENT TO THE PERFORMANCE OF THE ABOVE STATED OPERATION(S)/SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURE(S) BY DR. DAN M. DOROUGH AND THE PHYSICIANS WITH WHOM HE WORKS.

I ALSO HEREBY AUTHORIZE AND DIRECT DR. DAN M. DOROUGH AND THE PHYSICIANS WITH WHOM HE WORKS TO PROVIDE SUCH ADDITIONAL SERVICES FOR ME/THE PATIENT AS HE/THEY MAY DEEM REASONABLE AND NECESSARY, INCLUDING, BUT NOT LIMITED TO, THE ADMINISTRATION AND MAINTENANCE OF ANESTHESIA AND THE PERFORMANCE OF SERVICES INVOLVING PATHOLOGY AND RADIOLOGY.

I HEREBY AUTHORIZE THE PATHOLOGIST TO USE HIS DISCRETION IN THE DISPOSAL OF ANY SEVERED TISSUES OR MEMBER REMOVED IN SURGERY.

On the issue of the scope of consent, Fact #22, Plaintiff's expert, Dr. Richard Printz, opines that Defendant breached the standard of care in the treatment of Mrs. Martinez specifically based on the following [bolding added]:

¶8 Based upon my education, training, experience and review of the Records and documents in this case, it is my professional opinion that Dr. Dorough breached the standard of care in his care and treatment of Maria Martinez. I based my opinion specifically on the following:

a) The removal of the fallopian tube was not part of the emergent conditions related to the perforated uterus;

b) The Consent form does not give Dr. Dorough permission to perform elective non-emergent surgical procedures;
b) [sic, second b) The removal of the fallopian tube did not need to be undertaken immediately;
c) Dr. Dorough should have obtained consent before the removal of the fallopian tube;
d) Dr. Dorough should have performed testing of the fallopian tube prior to its removal to determine if the tube was patent (open) as the look from the outside is much less pertinent to the function. If the tube was not patent, Dr. Dorough should have made a determination whether there could be any surgical reconstruction, short of removal;
e) The removal of a fallopian tube is a simple procedure and can be done laprascopically. (Decl. of Richard Printz, filed on January 11, 2013 ¶8.)

Dr. Printz's declaration has no evidentiary value because it does not appear to be based on the language of the consent form. Although it's true that the consent didn't specifically give Defendant permission to "perform elective non-emergent surgical procedures," it gave Defendant and the physicians with whom he works consent "to perform *any other operation(s)/special diagnostic or therapeutic procedure(s) that his/their judgment may dictate to be advisable for my/the patient's well-being.*" [Italics added.] (Consent form, second paragraph.) That consent, along with the consent saying that plaintiff "*also hereby authorize[s] and direct[s] Dr. Dan M. Dorough and the physicians with whom he works to provide such additional services for me/the patient as he/they may deem reasonable and necessary . . .*" [italics added] makes it clear that Defendant had consent to remove a fallopian tube that had twisted and that Defendant and other members of his surgical team reasonably determined might cause problems, including ectopic pregnancy, later.

Consequently, Dr. Printz's statements that the consent form didn't give Defendant permission to perform "elective non-emergent surgical procedures" and that Defendant "should have obtained consent before removal of the fallopian tube" and that he "should have performed testing of the fallopian tube prior to its removal" and the ultimate statement that Defendant breached the standard of care, are of no value and do not raise a triable issue on the undisputed fact that Plaintiff gave written consent broad enough to permit Defendant to remove Plaintiff's fallopian tube. (Code Civ. Proc., § 437c, subds. (b), (g).)

An expert's opinion has no value if its basis is unsound. An expert's opinion may not be based on assumptions of fact without evidentiary support. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 An expert's opinion that is based on speculation or conjecture is inadmissible. (Evid. Code, § 801, subd. (b); *Mitchell v. United National Insurance Co. (*2005) 127 Cal.App.4th 457, 478.)

The court, as part of its gatekeeping function, can inquire into an expert's reasons for an opinion. Thus, the trial court acts as a gatekeeper to exclude expert opinion testimony based on reasons unsupported by the material on which the expert relies. (*Sargon Enterprises, Inc. v. University of Southern California, supra,* 55 Cal.4th 747, 771.)

The language of the consent form does not support Dr. Printz's conclusions and ultimate opinion.

Third cause of action for intentional infliction of emotional distress

The elements of a cause of action for intentional infliction of emotional distress are: (1) Defendant's conduct was outrageous; (2) defendant either intended to cause plaintiff emotional distress or defendant acted with reckless disregard of the probability that plaintiff would suffer emotional distress, knowing that plaintiff was present when the conduct occurred; (3) plaintiff suffered severe emotional distress; and (4) defendant's conduct was a substantial factor in causing plaintiff's severe emotional distress. (Judicial Council of Cal. Civ. Jury Instns. (Sept 2003) CACI No. 1600.)

The third cause of action doesn't state a valid cause of action for intentional infliction of emotional distress on behalf of either Plaintiff. It simply alleges that the actions of Defendants were intentional, extreme and outrageous and should and would shock the consciousness, done with the intent to cause serious emotional distress or with reckless disregard of the probability of causing Plaintiffs [plural] serious emotional distress. (Complaint, ¶¶19-21.) When a court treats a motion for summary judgment as one for judgment on the pleadings, leave to amend should not be granted where all possible facts have been alleged and it can be determined as a matter of law that no cause of action exists. (*Wood. v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1119-1120.)

"Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) There can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities, or threats which are considered to amount to nothing more than mere annoyances. (*Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1128.)

It is for the court to determine whether on the evidence severe emotional distress can be found, and it is for the jury to determine whether, on the evidence, it has in fact existed. (*Fletcher v. Western Life Insurance Company* (1970) 10 Cal.App.3d 376, 397.)

"It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware." [Italics added.] (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903–904.)

"'Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress. …' " (*Molko v. Holy Spirit Association* (1988) 46 Cal.3d 1092, 1122, internal citation omitted.)

Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, [fn.2]); insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403–404); landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281–282 ; hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791–792; attorney-client

(*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373; collecting creditors (*Bundren, supra,* at p. 791, [fn. 8]), and religious institutions (*Molko, supra,* at pp. 1122–1123).

In a very recent case that cites *Bundren v. Superior Court*, *So v. Shin* (Jan. 3, 2013) 13 Cal.Daily Op. Serv. 168, 2013 WL 28785, the plaintiff there underwent a D&C following a miscarriage. She alleged that she was administered inadequate anesthesia and awoke during the procedure. When she later confronted the anesthesiologist, the anesthesiologist became angry, shoved a container filled with plaintiff's blood and tissue at her, and then urged plaintiff not to report the incident. The plaintiff sued the anesthesiologist and her medical group, as well as the hospital, asserting that the anesthesiologist's conduct constituted negligence, assault and battery, and intentional infliction of emotional distress. The appeal was from a judgment of dismissal after demurrers and motions for judgment on the pleadings. (*So v. Shin, supra,* 2013 WL 28785, at p. 1.)

Concerning the cause of action for intentional infliction of emotional distress, the defendants urged that none of the conduct alleged could be characterized as extreme, outrageous, or outside the bounds of decency. The appellate court disagreed. (*So v. Shi, supra,* 2013 WL 28785, at p. 11.)

"There is no bright line standard for judging outrageous conduct and its generality hazards a case-by-case appraisal of conduct filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical." (*So v. Shi, supra,* 2013 WL 28785, at p. 11.)

The *So v. Shin* court discussed *Bundren v. Superior Court*, a case where a medical center's business office had called the plaintiff the day after she underwent surgery at the medical center to say that the plaintiff's insurance carrier had denied coverage and to ask how plaintiff intended to pay her medical bill. The caller's questioning lasted for 20-30 minutes and was "abusive, rude and inconsiderate." The *Bundren* plaintiff alleged she became extremely upset and believed she would be discharged if she did not make a commitment towards paying the medical bill. (*So v. Shin, supra,* 2013 WL 28785, at p. 11, citing *Bundren v. Superior Court, supra,* 145 Cal.App.3d 784, 788.)

The medical center moved for partial summary judgment, urging that its collection methods were consistent with common business practices. The Court of Appeal reversed the grant of partial summary judgment, holding that there were triable issues of fact as to whether the medical center acted in an unreasonable and outrageous manner. Contrary to what the medical center had claimed, it was not an ordinary creditor calling a typical debtor to request payment of a just debt, but rather, was in an apparent position of considerable power to affect the plaintiff's recovery. Under those circumstances, it was arguably reasonable for the plaintiff to fear that failing to make immediate arrangements for payment would result in the withdrawal of treatment and her being evicted from the medical facility. "Inasmuch as petitioner at the time of the call claimed to be feeling the effects of surgery, a trier of fact may well draw the conclusion that she was in all probability vulnerable. Moreover, it was alleged that Los Robles had knowledge of petitioner's physical state, as well as the fact that she

had recently been violently attacked with a machete. [¶] ... [¶] In short, there is a serious question as to whether the hospital's method of seeking payment, perhaps reasonable had it been attempted after petitioner had regained her health, was in fact reasonable in light of petitioner's alleged delicate physical and emotional state at the time of the call. Clearly, the resolution of this question should be through the consideration of live testimony presented to a trier of fact." (Id. at pp. 791–792, fns. omitted.) (*So v. Shin, supra,* 2013 WL 28785, at p. 11.)

Analogizing the *Bundren* case to its facts, the *So v. Shin* court determined that a reasonable juror could conclude that the alleged conduct could be extreme and outrageous. "As in *Bundren*, plaintiff here had recently undergone surgery; indeed, in the present case plaintiff was not only still in the hospital—she was in the recovery room. Further, plaintiff had recently miscarried, had required a procedure to remove the dead fetus from her uterus, and claimed to have awakened during the procedure. Under these circumstances, a trier of fact "may well draw the conclusion that she was in all probability vulnerable" and, as in *Bundren,* that Dr. Shin unquestionably knew of plaintiff's physical state. Moreover, a reasonable juror could conclude that forcing a patient who had recently miscarried to look at what she believed to be her dismembered fetus was extreme and outrageous. Accordingly, the trial court erred in concluding that Dr. Shin's conduct was not extreme or outrageous as a matter of law." The judgment of dismissal was reversed. (*So v. Shin, supra,* 2013 WL 28785, at p. 12.)

In determining whether or not to allow Plaintiffs to amend to allege a cause of action for intentional infliction of emotional distress on behalf of either Plaintiff, this Court has considered all the evidence presented on the issue of what Defendant told the Plaintiffs about the "tummy tuck" and the surrounding circumstances of those conversations.

In support of the motion. Defendant says he had a conversation with Mr. Martinez in the waiting room. He says he does not typically use surgical terminology like that found in his operative report (and in some of the paragraphs of his declaration) in speaking with a patient's family as he doesn't feel it's helpful. "With Mr. Martinez, I explained that there had been a perforation of the uterus during the D&C, but that we had been able to repair it by performing an open procedure using the previous C-section site. I told Mr. Martinez of my findings related to the abnormal left fallopian tube. I told him that I had removed it. I also told him that I had removed the old C-section scar and that I tried to make it look better than it had before. I do remember telling Mr. Martinez that I had tried to make the scar 'look better.' I do not remember calling the scar removal a tummy tuck and it is not my practice to use that terminology. ¶ In speaking to Mr. Martinez I do not remember winking, smirking, or nudging him. He gave no indication of being upset. If he had told me about his perception of what I said and did as set forth in his declaration, I would have clarified that I did not perform an andominoplasty and that it was not my intent to wink, smirk, nudge or infer that I performed the scar removal for his benefit. I would have explained that I removed the scar as part of the laparotomy to encourage good wound healing to make the scar look as good as possible under the circumstances." (Decl. of Dan Dorough, ¶25-26.)

At Defendant's deposition, Defendant testified about his conversation with Mr. Martinez after the surgery:

Q. Okay. But that's where you come in to say what you actually told him. So you're giving me some generalities, but what do you specifically recall in terms of the description? Because Mr. Martinez gives a description that used like a box. Okay? Are you saying you did not use a description like a box? Maybe he's using a big box and you used a small box, but you haven't shown me that. You've shown me—
A. I'm not exactly sure, but I know I would not have gone it was this big and this wide.
Q. No.
A. I may have gone it was this wide and this long and he may have misunderstood.
Q. Okay. So what do you recall that you did?
A. That's what I recall doing.
Q. Show me. Tell me what that was.
A. I recall going out and telling him you remember how her scar was side and unsightly, I took the scar out. And when I talked to him I said I took out, I took the scar out this wide and about that long.
Q. So what's that –
A. A centimeter wide and approximately five inches long.
Q. Okay.
A. Approximately. I can't remember exactly where my fingers were.
Q. Which is going around the scar and taking out that tissue --.
A. Right.
Q. – having a clean edge?
A. Right.
Q. Yeah. Getting rid of the hypertropic scar. All right. Because his description is vastly different than your description, and I needed to hear it from you. So we're hearing the words tummy tuck and so forth. Do you believe that you used those words?
A. No.
Q. Do you specifically recall that you did not use tummy tuck?
A. Yes.
Q. What did you use?
A. I would never use tummy tuck in that situation because tummy tuck implies abdominoplasty. That's a procedure that's usually done by a plastic surgeon. I did not do that to her, so I never would have said tummy tuck.
Q. Right. And you're not a cosmetic surgeon so you don't do tummy tucks; correct?
A. I don't do plastic surgery tummy tuck abdominoplasties. I do panniculectomies, small panniculectomies.
Q. I don't know what a panniculectomy is. Tell me what that is.
A. Panniculectomy is taking off, if you're doing an incision in the patient's abdomen for whatever type of surgical procedure, if they have a little roll of extra fatty tissue there, I will sometimes take that off for them.
Q. Okay. And is that called a mini tummy tuck?
A. I have never called that a mini tummy tuck. I call it removal of excess skin.
Q. Okay.
A. And if they ask me what the medical term is for that, I say panniculectomy. I never say it's a tummy tuck or abdominoplasty.
Q. Okay. You don't call it a mini abdominoplasty, do you, or anything?

A. No. I usually call it removal of excess abdominal skin.
Q. Okay. So any idea where this word tummy tuck came from?
A. I don't know where that came from. Again, I know he was upset. He got bombarded with a lot of information. I don't know where that came from. I did not tell him that.
Q. He didn't – the reason I'm asking this is perhaps you gave a description to him and he reiterated the words to you instead of them coming – you don't recall if he did that, if he said so is that a tummy tuck?
A. I specifically remember that neither he nor I ever said tummy tuck.
Q. Okay. Did you talk with him about – you had mentioned that you did recall that it would look better, the scar would look better. Do you recall any conversation about she'll look good in a bikini?
A. No.
Q. Have you read some of the statements that – I'm sure you have. I would imagine you have. And one of the allegations is that you made a statement in the sense to Mr. Martinez privately that she'll look good in a bikini, or something to that effect. Did you ever say those words?
A. No.
Q. Anything other than what you have told me that you remember?
A. No.
Q. So –
A. Just that the scar was removed and that it would look better.
Q. Okay. Do you have any idea where the term bikini came out?
A. No, no idea.
Q. Another allegation is that when you're having this conversation – and you're having this directly with Mr. Martinez; correct?
A. Yes.
Q. Where are you located?
A. I'm not sure, but it usually would have been – I would have called him out of the waiting room and around to a move private area and had this discussion with him.
Q. Okay. And where was Mrs. Martinez?
A. In the operating room still being woken up or in recovery.
Q. Okay. You know as well, too, and I'll just reiterate that Mr. Martinez alleges that you kind of did a wink-wink, nod-nod, kind of like a guy-to-guy she's going to look good in a bikini. Did you do any wink-wink, nods-nods?
A. No.
Q. Any kind of behavior like that?
A. No.
Q. Any idea where Mr. Martinez would be coming up with that?
A. No.
Q. Such as he did the wink-wink, nod-nod, like thanks, Doc, that's awesome; that didn't happen either?
A. No.
(Depos. of Dan Dorough, pp. 108:7-113:10.)

There is also deposition testimony from Mrs. Martinez concerning the conversation she had with Defendant about the surgery.

Q. Was it on the day that you had your surgery that Dr. Dorough had this conversation with you?
A. That I can remember, yes. Uh-huh.
Q. Who was present?
A. Myself, my husband Felipe, and himself, Dan Dorough.
Q. Anyone else?
A. That I can remember, just the three.
Q. Tell me about that conversation. What did Dr. Dorough say?
A. That day, he had told me that the surgery went well, that I had lost half a blood – of a can, and he told me that he had erupted my uterus. And that he had – that he had found a fallopian twisted. And so he had to remove it. I believe it was the right fallopian. And he said that he gave me a tummy tuck because my scar was all – it was awful. So he had to give me – he had given me a tummy tuck. When he told me gave me a tummy tuck –
Q. Okay. Keep – go ahead.
A. When he told me he gave me a tummy tuck, I – I was shocked when he told me that, because that's not what went for that day. I looked at my husband, I told him, we're not going to – he told me that I got – that he wasn't going to charge me for the tummy tuck, so that he actually had one of his assistants not charge.
(Depos. of Maria Martinez, pp. 23:17-24:18.)

Q. Did – what was the first information that you got about there being a complication during the surgery?
A. Like what do you mean, after the surgery.
Q. Yes.
A. Can you explain?
Q. Maybe a nurse told you, or maybe it was the conversation that you mentioned earlier with Dr. Dorough. What was the first thing you know about what had happened during the surgery?
A. Oh, what he had told me that I had lost an amount of blood the size of a can, half the size of a can of Coke, and he said that – that he found my fallopian being twisted. So, he took the initiative of removing it. And he also told me that he did remove this chunk of skin. That he had given me a tummy tuck.
Q. So he said he removed a chunk of skin?
A. That he had given me a tummy tuck, and that – he didn't say that – well, I can't – I can't say exactly what he said, because I don't remember exact words that he said, but he did, again, like I said, he did put it out there that he removed this much, and he had given me a tummy tuck.
(Depos. of Maria Martinez, pp. 72:11-73:8.)

More testimony was elicited from Mr. Martinez at deposition:

Q. And tell me where you were located physically when Dr. Dorough came and talked to you.
A. In the waiting room.
Q. And what did he say?
A. Well, first of all, I was nervous, because he did mention before that it was going to be a quick 15-minute procedure. Two hours went by, and I finally saw the doctor. So, in my

mind, in my heart, I already felt something went wrong. He came out, and he just said, "I have good news and bad news." So, I stood up, I looked at him. He goes, "What do you want to hear first, the good news or the bad news?" I go first of all, "Is she alive?" I asked him, "Is she alive?" He said, "Yes, she's alive." And then I said, "Okay, give me the bad news now." And that's when he said that he went in blind, and as he went in blind, he said he went in and punctured the uterus, because he said he didn't know the uterus was up. So he said it went like a knife going through butter, and he made a sound like, you know. She when he said that, I go, okay. He goes, "After that, I punctured a main artery." He burst an artery. I'm sorry it's hard because –
Q. That's all right. And if you at any time want to take a break and come back, that's fine, too.
A. I should be okay. When he told me he punctured the artery that she was bleeding a lot. So when he noticed she was bleeding, he had to open her up. And that's when he had to go in there and stop the bleeding, he had to solder the bleeding quickly before it reached to her lungs. So then he said he had a team of doctors, he said it was him and his brother and a team of doctors that had done the surgery, and he said when he was down there, he said he noticed that a fallopian tube was twisted. So, he said they all decided to pull it out. And I asked him was that life-threatening? He said no. Then from there, he gave me – since I was standing up, he said, "It was probably a good thing that this happened, because I caught that tube that was twisted." I said "Go ahead."
From there, he just told me – he looked at me, and he goes, "Plus I gave your wife a free tummy tuck." He went like this. He show this much. He literally picked up his hands. And he looked at me and said, "I gave her a free tummy tuck so she can look flat for the summertime when she wears her jeans." I stayed puzzled. I go, "Tummy tuck?" I go, "We didn't come for a tummy tuck." He goes, "Yeah, but I just flattened her up." He goes, "I just redid her scar." So then he told me she lost about a whole can of blood. And I asked him, "Does she need a blood transfusion?" He said, "No, I am going to give her iron pills, she should be fine."

From there, I stayed puzzled. Because I told the doctor, "Wow, yeah, I didn't hear you guys after 15 minutes, I figured 30 minutes went by," I said, "Okay, it took a little longer, two hours, I was a little worried." He said, "She's going to be fine. She's in the recovery room. I will go take you to her." As I walked to the recovery room, he just mentioned that she was going to be getting good treatment, and the iron pills was going to be fine, and she's going to be – she's going to be staying in the hospital longer than what she was going to stay for the D&C, which was in and out. He said it was supposed to be a 15-minute procedure. And he goes in and out 15 minutes, I will be home for dinner tonight, he goes, with no worries. And that's when we got to the room where Mary was at, the recovery room.
(Depos. of Felipe Martinez, pp. 48:11-51:9.)

Mr. Martinez testified about when Defendant came back later that evening and spoke with both Plaintiffs:

Q. Okay. And what was discussed?
A. He told Maria the same thing he told me, that he went in blind and punctured her uterus, that her uterus was up, and he didn't know that. So when he went in, it was like

a knife going through the butter just going right through, and that's when he hit the artery in the back. And she had a lot of bleeding going on. So he had to reopen her to solder the artery. And that's when he told her that he ended up seeing the twisted fallopian tube. And Maria said, "What do you mean a twisted fallopian tube?" He explained to her it just was twisted. So, him and a team of doctors ended up deciding to go pull it out. And he gave her a free tummy tuck.
Q. Was there any hand gestures in this conversation –
A. Yes.
Q. – as far as how much the – of the skin?
A. Yes, he holds his hands up to Maria and told her he took up about this much of her stomach and pulled it down and tightened her up.
Q. And do you recall those were the exact words, pulled it down and tightened her up?
A. Yes.
Q. And what, if anything, did the two of you say?
A. Maria asked him, "What do you mean a tummy tuck? I want to have more kids." Like she kind of laughed. How's that going to be. Now my skin is going to stretch. It's going to hurt more. And he laughed. He said, "No, you should be okay, still have more kids, but I just tightened you up so you will have a flat stomach." She asked him about the fallopian tube. And she said, "I don't know that that was twisted." He just said, "Well, we ended up removing it because it was twisted."
(Depos. of Felipe Martinez, pp. 61:4-62:15)

There was more testimony from Mr. Martinez about his embarrassment:

Q. And the embarrassment that you feel –
A. The embarrassment I feel is knowing that I was like 50 feet away from the surgery room, I would have wanted the doctor to come out and let me know what was going on. If the fallopian tube wasn't life-threatening, like I asked him, he said not, if he would have asked me, you know, I would have just told him leave it in there if it's not life-threatening, and when she recuperates if she wants to come back and get it out, then it's going to be her choice. I can't make a choice. Unless it is life-threatening, I would have been okay with it. So I felt like helpless 50 feet away and her own husband can't even protect her. I felt embarrassed, and he was able to tell me everything he did to her. And he gave me a smirk, winked his eye at me, to me it felt like that's a slap in my face, because we didn't come for that.
(Depos. of Felipe Martinez, pp. 76:23-77:16.)

In response to special interrogatory #11, where Plaintiff was asked all of the specific facts upon which Plaintiff accused Defendant of negligence, carelessness, or failure to meet the standard of medical practice in connection with any aspect of his care of Plaintiff, Plaintiff responded, in part:

Dr. Dorough humiliated me by speaking with my husband about "tightening me up" and that "now I would look good in the summer-time" because of this tummy tuck. I find it humiliating and outrageous that Dr. Dorough would fail to speak with my husband prior to removing my fallopian tube or performing this tummy tuck but yet,

after the fact, Dr. Dorough would have the audacity to wink, nod and state something so personal and inappropriate with my husband. We were flabergasted. [sic]
(Exhibit G of Defendant's evidence.)

In response to special interrogatory #15, when Mr. Martinez was asked about the substance of what was said between Mr. Martinez and Dan during their conversation:

To the best of my ability, I remember that Dr. Dorough told us that the procedure would take 15 minutes. Thereafter, Dr. Dorough told me [sic] went in blind on the D&C procedure and he punctured my wife's uterus and told me that he thought there was a lot of blood so her performed a laparoscopy in order to see inside. I believe I remember that Dr. Dorough also used some langue to the effect that he thought he had punctured an artery too and that he had to drain all of the blood before it turned deadly. Dr. Dorough then told Plaintiff that his wife lost about a "coke can" of blood and told him that was no big deal and that he would Plaintiff iron pills. Then Dr. Dorough told Plaintiff that when he was sucking the blood out, he noticed that one of the fallopian tubes was a little twisted and that he and a "team of doctors" all decided to remove it. I asked whether it was a life-threatening situation and Dr. Dorough said no, but since we were already "down there" he thought he would remove it so she wouldn't have to worry about it. I asked Dr. Dorough if she can still have children and he told me yes, but now it is 50-50. Dr. Dorough then explained that after removing the fallopian tube he gave Plaintiff a free "tummy tuck" and that he "tightened her up for me" and that now in the summertime your wife can look nice with a flat stomach. I couldn't speak too much as I was shocked that this had turned into some a [sic] major surgery and Dr. Dorough did stuff to my wife that we had no input in. I also was shocked because we were attempting to get pregnant so it was ridiculous that he would give her a tummy tuck without even asking anybody. Dr. Dorough then apologized and told me that he thought it would only be a 15 minute surgery and that everyone was supposed to be home for dinner. There was a little more conversation about my wife going to recovery.
(Exhibit H of Defendant's evidence.)

Mrs. Martinez says in her declaration opposing the motion:

6. Finally, I felt [sic] humiliated me by speaking with my husband about "tightening me up" and that "now I would look good in the summer-time" because of this tummy tuck. I find it humiliating and outrageous that Dr. Dorough would fail to speak with my husband prior to removing my fallopian tube or performing this tummy tuck but yet, after the fact, Dr. Dorough would have the audacity to wink, nod and state something so personal and inappropriate with my husband. I was flabbergasted and embarrassed." (Decl. of Maria Martinez, ¶6.)

Clearly then, the cause of action involving any emotional distress suffered by Mrs. Martinez concerning a statement allegedly made by Defendant to Plaintiff's *husband* about "tightening her up", winking and nodding, etc., and was not directed at Mrs. Martinez directly, and was not said or conducted in her presence. This is not a situation such as *Bundreen v. Superior Court, supra,* 145 Cal.App.3d 784, 791-792, where the hospital's business office had called the plaintiff while still at the medical center, the

day after she had undergone surgery, and launched into 20-30 minutes of questioning about how plaintiff intended to pay her medical bill, or as in *So v. Shi, supra,* 2013 WL 28785, at page 12, where an anesthesiologist forced a patient who was still in the recovery room recovering from a D&C to remove the dead fetus from her uterus to look at what the plaintiff believed was her dismembered fetus; in each of these two cases, the statements and conduct were directed at the plaintiff.

Defendant had no doctor-patient relationship with Mr. Martinez. Mr. Martinez was not a patient in the hospital, recovering from a surgery or anesthesia and in a vulnerable state. While if this conduct/statement would have been made to Mrs. Martinez while she was in the hospital and thus still vulnerable, the court could have determined determine that on the evidence, severe emotional distress could have been found as to Mrs. Martinez, the Court concludes severe emotional distress cannot be found on behalf of Mr. Martinez. (*Fletcher v. Western Life Insurance Company, supra,* 10 Cal.App.3d 376, 397.) The alleged conduct and statements, as directed to a non-patient, does not appear to have been so outrageous and extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Davidson v. City of Westminster, supra,* 32 Cal.3d 197, 209.) Consequently, leave to amend will be denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/22/13.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Ali v. Arcadian Health***
Superior Court Case No.: 11CECG03917

Hearing Date: January 24, 2013 (**Dept. 502**)

Motion: Motion to strike fourth amended complaint by Defendant Arcadian Health Plan

Tentative Ruling:

To grant, with Plaintiff granted until February 4, 2013, to file and serve a fifth amended complaint. All new allegations in the fifth amended complaint are to be set in **boldface** type.

Explanation:

The fourth amended complaint filed on September 17, 2012, does not comply with this Court's prior order of May 17, 2012, Judge Hamilton's order of September 12, 2012, or Code of Civil Procedure section 425.10, subdivision (a)(2).

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/22/13.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***In re Jaramillo et al.***
Superior Court Case No. 09CECG01488

Hearing Date: January 24, 2013 (Dept. 502)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/22/13.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***JB Development, LLC v. City of Fresno***
Superior Court Case No. 11CECG00557

Hearing Date: January 24, 2013 **(Dept. 502)**

Motion: By Defendant seeking an award of attorney's fees

Tentative Ruling:

To deny the motion for attorneys' fees pursuant to 42 U.S.C. § 1988(b). The Defendant has not met its burden of proof requiring a showing that the Plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." See *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 US 412, 421, 98 S.Ct. 694, 700.

To grant the motion for attorneys' fees pursuant to Cal. Civ. Proc. Code § 405.38 and to award attorneys' fees of $5.862.50.

Explanation:

An award of reasonable attorney fees to prevailing parties is authorized as part of the costs in actions brought under federal civil rights laws:

> "In any action or proceeding to enforce a provision" of the Civil Rights laws (i.e., 42 USC §§ 1981, 1981a, 1982, 1983, 1985; 20 USC § 1681 et seq.; 42 USC § 2000bb et seq.; 42 USC § 2000d et seq.; or 42 USC § 13981), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ... " [42 USC § 1988(b)]

Section 1988 attorney fee awards are discretionary. Accordingly, the court may deny a prevailing party's request for attorney fees if it determines fees in the particular case are not justified. See 42 USC § 1988(b).

A *prevailing defendant* is entitled to fees only if plaintiff's lawsuit "was frivolous, unreasonable, or without foundation." See *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 US 412, 421, 98 S.Ct. 694, 700. See also *Dillon v. Brown County, Neb.* (8th Cir. 2004) 380 F3d 360, 365 and *Harris v. Maricopa County Sup.Ct.* (9th Cir. 2011) 631 F3d 963, 968–969. When deciding whether a claim is frivolous, the "court must assess the claim **at the time the complaint was filed**, and must avoid *post hoc* reasoning ... " [*Tutor Saliba Corp. v. City of Hailey* (9th Cir. 2006) 452 F3d 1055, 1060 (internal quotes omitted)] An action is not frivolous or unreasonable simply because plaintiff ultimately loses: "Even when the law or the facts appear questionable or unfavorable at the outset, a (plaintiff) may have an entirely reasonable ground for bringing suit." [*Christiansburg Garment Co. v. E.E.O.C.*, supra, 434 US at 422, 98 S.Ct. at 701 (parentheses added)]

To assess attorney fees against plaintiffs simply because they do not finally prevail would substantially add to the risk of litigation and undermine congressional efforts to promote vigorous enforcement of the civil rights statutes. [*Hughes v. Rowe* (1980) 449 US 5, 14, 101 S.Ct. 173, 178] A suit is frivolous if "so lacking in arguable merit as to be groundless or without foundation." [*Walker v. City of Bogalusa* (5th Cir. 1999) 168 F3d 237, 240—prevailing defendant fee award upheld where plaintiff's claim "patently frivolous"; *Karam v. City of Burbank* (9th Cir. 2003) 352 F3d 1188, 1195—case deemed frivolous only when result obvious or arguments wholly without merit]

A prevailing defendant is not required to establish bad faith on plaintiff's part. But a showing of bad faith "provides an *even stronger basis* for the award." [*Panetta v. Crowley* (2nd Cir. 2006) 460 F3d 388, 399 (emphasis added; internal quotes omitted)] In civil rights actions involving **both** frivolous and nonfrivolous claims, a prevailing defendant may recover only the reasonable attorney fees incurred "solely because of the frivolous allegations." [*Fox v. Vice* (2011) US , , 131 S.Ct. 2205, 2218—defendant cannot recover for fees that would have been paid in absence of frivolous claims]

The Court will grant the Plaintiff's request for judicial notice pursuant to Evidence Code § 452 (d)(1). The Court notes that there were two demurrers filed. The first was filed to the original Complaint. The court overruled the demurrers to the first and second causes of action and sustained the demurrer with leave to amend to the third cause of action. Despite the removal of the third cause of action, the City persisted in filing a demurrer to the first and causes of action despite the fact that the previous demurrers had been overruled. When the Court overruled all the demurrers, the City filed a petition for a writ of mandate in the Fifth District Court of Appeal. The petition was denied. Therefore, at the time the complaint was filed, a prima facie claim had been stated. See *Tutor Saliba Corp. v. City of Hailey* (9th Cir. 2006) 452 F3d 1055, 1060.

Simply because the Plaintiff lost at trial does not mean that the case was frivolous. See *Christiansburg Garment Co. v. E.E.O.C.*, supra, 434 US at 422, 98 S.Ct. at 701. In ruling upon defendant's motion for judgment pursuant to Code of Civil Procedure section 631.8 the court weighed the evidence and concluded the motion should be granted because, in essence, plaintiff did not prove defendant acted in bad faith in connection with its disposition of the Palm Lakes property. As the court also found, however, defendant's handling of the disposition of the Palm Lakes property was hardly a model of civic behavior inasmuch as mistakes were made and there was a marked failure to communicate by defendant internally and externally, which very well may have created the appearance of bad faith and provided justification for the filing and pursuit of the action. The court thus denies the motion for attorneys' fees brought pursuant to 42 U.S.C. § 1988(b).

However, the court does find that defendant is entitled to its attorneys' fees incurred in connection with its motion to expunge the lis pendens recorded by plaintiff when the action was filed and voluntarily withdrawn after the filing of defendant's motion but before the hearing. (Cal. Civ. Proc. Code § 405.38; *Castro v. Superior Court* (2004) 116 Cal. App. 4th 1010, 1022.) The court finds no real property claim was stated in plaintiff's complaint, plaintiff did not have substantial justification for recording the lis pendens, and the motion would have been granted had it been pursued.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 1/23/13.
(Judge's initials) (Date)